The Louis G. Freeman Company *and* International Association of Machinists and Aerospace Workers, Local Lodge 162, AFL-CIO. Case 9-CA-14133

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 16 September 1981 Administrative Law Judge Charles M. Williamson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending employees Alvin Rust and Glenn Madden for 3 days. In so doing, he declined to defer, under the doctrine of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), to the decision of an arbitrator upholding the suspension of Madden but reducing the suspension of Rust to a written warning. The Respondent has excepted to both the finding of a violation and the refusal to defer to the arbitrator's award. For the reasons set forth below, we find that deferral to the arbitrator's award is appropriate, and we dismiss the complaint.

On 24 July 1979 employee Rust asked Foreman Sturgill if he could leave work 2 hours early in order to make arrangements for the repair of his truck, which had broken down that morning on the way to work. Sturgill denied the request. Rust then shut down his machine and went to see chief steward Madden at the latter's work station. While they were discussing the matter, Sturgill joined them. As found by the arbitrator, during the ensuing conversation Sturgill advised Rust to return to work at least three times, and Madden at least twice said to Rust, "Wait a minute, Alvin." Subsequently, the Respondent gave both employees 3-day suspensions for insubordination—Rust because he allegedly refused to return to work immediately on being instructed to do so by Sturgill, and Madden because he allegedly suggested to Rust that he should not immediately comply with the instruction. Both employees grieved their suspensions, and their grievances ultimately went to arbitration.

The arbitrator noted that, while the subject of Rust's and Madden's conversation may have constituted protected activity, absent a contractual right or the Respondent's acquiescence they had no right to discuss grievances on company time. He found that there was no such contractual right, and that, even if there was a practice of discussing grievances during working time, this had occurred without the knowledge and acquiescence of members of management. He also found that any initial acquiescence by Sturgill in discussing Rust's complaint terminated abruptly when Sturgill ordered Rust to return to work, and that any belief on Rust's part that because Madden told him to "wait a minute" he could delay his return was dispelled by Sturgill's reiteration of his order. Accordingly, he concluded that Rust and Madden were not engaged in protected activity at that time, that Rust should have responded to the order to return to work, that Madden should not have attempted to delay Rust until the matter had been discussed, that both Madden and Rust failed to follow the principle of "work now and grieve later," and that therefore their conduct constituted insubordination. However, noting that the discussion had become heated, that Rust's failure to comply immediately with Sturgill's order was in part due to Madden's telling him to "wait a minute," and that Rust may have had some notion it was appropriate to discuss his grievance on company time, the arbitrator reduced Rust's suspension to a written warning.

The judge refused to defer to the arbitrator's award because he concluded that the arbitrator did not rule on the statutory issue or make all the factual findings required to decide it. In so doing, he noted initially that the General Counsel made no claim that the arbitration proceeding was not fair and regular, or that the parties had not agreed to be bound by the result, and that therefore two of the three criteria for deferral under *Spielberg* were met. He also found that the unfair labor practice issue was presented to the arbitrator. However, he further found that in ruling on that issue the arbitrator made no distinction between the initial Rust-Madden conversation, which was not the basis for the discipline, and the brief Rust-Madden-Sturgill conversation, and that as a result the arbitrator did not determine whether Rust and Madden were engaged in protected activity when they attempted to discuss Rust's grievance with Sturgill, or whether, assuming they were engaged in protected activity, their conduct toward Sturgill removed them from the protection of the Act. Accordingly, he concluded that the arbitrator failed to make the necessary findings for a resolution of the case in accord

with Board law and, consequently, failed to rule on the statutory issue.

The Respondent contends that the arbitrator's award was not clearly repugnant to the purposes and policies of the Act, and that therefore the judge should have deferred to the arbitrator's award. The General Counsel, although conceding that the arbitration proceeding was fair, regular, and acquiesced in by both parties, that the alleged unfair labor practices were presented to the arbitrator, and that the arbitrator attempted to dispose of them in his award, reiterates his contention to the judge that deferral is not appropriate "because the arbitrator's factual findings are erroneous and because the arbitrator's legal conclusions are not consistent with Board law and are, therefore, repugnant to the Act." We find for the reasons set forth below that deferral is appropriate.

Initially, we find that, contrary to the judge and as the General Counsel concedes, the arbitrator adequately ruled on the statutory issue. In our recent decision in *Olin Corp.*, 268 NLRB 573 (1984), we held that an arbitrator will be found to have adequately considered the unfair labor practice issue in a case if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue. The *Olin* formulation of the governing standard was plainly met by the arbitrator's award here.

As noted above, the arbitrator found that any acquiescence by Sturgill in discussing Rust's grievance during working time terminated when Sturgill ordered Rust back to work, and that any belief on Rust's part that he could delay his return because Madden told him to "wait a minute" was dispelled by Sturgill's reiteration of his order. Based on these findings, the arbitrator concluded that Rust and Madden at that time were not engaged in protected activity. Contrary to the judge, in so doing the arbitrator could only have been considering the Rust-Madden-Sturgill conversation. Additionally, by further finding that, even assuming initial acquiescence in the grievance discussion, discipline was justified, the arbitrator necessarily found that Rust's conduct in delaying his return to work, and Madden's conduct in countermanding Sturgill's order, removed them from the protection of the Act. In view of the foregoing factors, we find that, as required under our *Olin* formulation of the governing standard, the contractual issue was factually parallel to the unfair labor practice issue, and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice issue; indeed, the General Counsel so concedes, and the judge so found.[1]

We further find, contrary to the General Counsel's contention, that the arbitrator's award is not clearly repugnant to the principles and policies of the Act. As we reiterated in our decision in *Olin*, in determining if an arbitrator's award is clearly repugnant under *Spielberg*, the test to be applied is not whether the Board would have reached the same result, but whether the award is palpably wrong as a matter of law.[2] Furthermore, contrary to the General Counsel's argument, unless an examination of the record evidence before the arbitrator reveals facial error in the arbitrator's factual findings, this determination should be made based on the facts he has found on that record.[3]

We are not persuaded that the arbitrator's decision here is deficient on either count. Thus, the Board has held that an employee who attempts to discuss a grievance during working time lawfully can be ordered to return to work under the threat of discipline[4] or be disciplined for refusing to do so.[5] On the other hand, the Board has held that a temporary failure to comply with an order to return to work after a heated exchange in the course of a grievance meeting may fall within the protection of the Act. See, e.g., *Postal Service*, 251 NLRB 252 (1980), enfd. 652 F.2d 409 (5th Cir. 1981). The appropriateness and duration of such a cooling off period depends on the facts of each case. See, e.g., *Postal Service*, 652 F.2d at 412.

In the present case, the arbitrator considered the facts surrounding Rust's failure to obey Sturgill's order and Madden's attempted countermanding of that order, and concluded that the conduct of Rust and Madden fell outside the protection of the Act. As noted above, the issue before us is not whether we would reach the same conclusion as the arbitrator. Rather, the issue is whether the arbitrator's conclusion is palpably wrong as a matter of law. We find that the General Counsel has failed to show that the arbitrator's award is not susceptible to an interpretation consistent with the Act. Since

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[1] As already indicated, the judge found that the governing standard was not met because the arbitrator failed to explicitly make the factual findings necessary to resolve the statutory issue. Our *Olin* formulation of the governing standard, however, does not require the arbitrator to explicitly resolve the statutory issue; it requires only that the contractual issue be factually parallel to the statutory issue, and that the arbitrator be presented generally with the facts relevant to resolving the statutory issue.

[2] See also *Inland Steel Co.*, 263 NLRB 1091 (1982); *G & H Products*, 261 NLRB 298 (1982); *International Harvester Co.*, 138 NLRB 923, 929 (1962).

[3] *Inland Steel Co.*, supra; *Atlantic Steel Co.*, 245 NLRB 814 fn. 2 (1979); *Kansas City Star Co.*, 236 NLRB 866, 867 (Members Penello and Murphy), 868-869 (Member Truesdale concurring) (1978).

[4] See, e.g., *IML Freight*, 249 NLRB 861, 865 (1980).

[5] See, e.g., *General Motors Corp.*, 235 NLRB 49, 50 (1978).

we find that the General Counsel has failed to show that the arbitrator did not consider the statutory issue or that his award is clearly repugnant to the purposes and policies of the Act, we shall defer to the arbitrator's award and dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

CHARLES M. WILLIAMSON, Administrative Law Judge. This case was heard before me at Cincinnati, Ohio, on May 21 and 22, 1981. The complaint, which issued on October 1, 1980, is bottomed on a charge filed July 25, 1979.[1] The complaint alleges that The Louis G. Freeman Company, herein designated Respondent, violated Section 8(a)(1) and (3) of the Act when it suspended its employees Alvin Rust and Glenn Madden for a period of 3 days on July 24, 1979.

On the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by Respondent and the General Counsel,[2] I find the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation, maintains an office and place of business in Erlanger, Kentucky, where it is engaged in the manufacture of shoe machinery and shoe dyes. During the 12 months prior to the hearing, a period of time representative of all times material herein, Respondent, in the course and conduct of its business, sold and shipped from its Erlanger, Kentucky facility products valued in excess of $50,000 directly to points and places outside the Commonwealth of Kentucky. The complaint alleges, Respondent admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint does not allege that International Association of Machinists and Aerospace Workers, Local Lodge 162, AFL–CIO, hereafter designated the Charging Party, is a labor organization within the meaning of Section 2(5) of the Act. Based on the record as a whole, including the facts that Respondent and the Charging Party are parties to a collective-bargaining contract and that the Charging Party handles formal grievances on behalf of Respondent's employees, I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

[1] G.C. Exh. 1(i), the index and description, gives the date of the charge as July 25, 1980. The index is hereby corrected to show the correct date for the charge.

[2] This term is used to designate counsel for the General Counsel.

III. THE UNFAIR LABOR PRACTICES

A. *Facts*

This case initially presents for decision the following issues: (1) Should the Board defer to an arbitrator's award under the doctrine of *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955); (2) Is the Board bound by the factual findings of the arbitrator in a case if the arbitrator's ultimate decision is "clearly repugnant to the purposes and policies of the Act" (id. at 1082)? (3) Were Respondent's employees Alvin Rust and Glenn Madden engaged in protected concerted activity during the course of their conversation with Respondent Supervisor George Sturgill in July 24, 1979?[3] (4) Were Rust and Madden insubordinate to Sturgill by (a) refusing to return to work and (b) ordering or suggesting to another employee that he disobey a lawful order to return to work, respectively, as contended by Respondent?

The facts in the case are brief and, except for portions of the July 24 conversation, essentially uncontested. Respondent and the Charging Party are parties to a collective-bargaining agreement (G.C. Exh. 2) which provides that "overtime work in excess of ten (10) hours per day and five (5) hours on Saturday will be voluntary . . . ." On Friday, July 20, Foreman Sturgill asked Rust to work an additional hour (the so-called eleventh hour). Rust stated that he was unable to do so because he was committed to visit his wife's ill grandmother. Sturgill replied that Rust reminded him of a puppet on a string who could only act by permission of his wife.[4] Rust consulted with union steward Madden about the incident. Madden was concerned because overtime was voluntary and he checked Rust's story with two other employees who, Madden asserted, confirmed Rust's account. (Tr. 24–26.)

On July 24 Rust's truck broke down on the way to work and he was compelled to leave the vehicle by the roadside. After arriving at work, Rust asked Sturgill if he could get off at 3:30 p.m. (2 hours early) in order to take care of his truck. Sturgill replied that Rust asked for a lot of favors but, when he was asked to work the eleventh hour, he refused. The parties stipulated at the hearing that "[i]t was a common practice at Louis G. Freeman Company on or about the time of July, 1979 that the following was an accepted reason for excused absence from the company . . . '[t]he day of an automobile accident which immobilizes your vehicle and four hours if your automobile is immobilized due to normal wear.'" (Tr. 89.) As may be seen, Rust was requesting but 2 hours. Sturgill walked away after Rust began to explain that the time off, under the circumstances, was accepted policy. Sturgill did not explicitly grant or deny Rust's request. Rust then went to Madden to examine the possibil-

[3] All dates henceforth are 1979 unless otherwise designated.

[4] Sturgill was unable to remember asking Rust to work overtime on July 20 and denied ever taunting Rust about being henpecked. Sturgill impressed me as evasive about the events of July 20 and I do not credit him. On July 24, when Rust asked to leave early, Sturgill admittedly commented that Rust wanted a lot of "favors." I attribute the latter remark to Sturgill's resentment at Rust's July 20 refusal to work the eleventh hour and not to Rust's volunteer life saving activities to which Sturgill attributed it. See Tr. 138–139.

ity of filing a grievance. While the two were discussing the matter, Sturgill came by.[5] As he did so, Madden (who was seated) tapped him on the leg and asked if he had a minute because there was a potential grievance. Article VIII, section 1 of the collective-bargaining contract (G.C. Exh. 2) provides that the first step of the grievance procedure occurs when the complainant, the supervisor involved, and the union representative discuss the problem. Sturgill asked what the problem was. Madden began asking Sturgill about Rust's request to leave early, specifically asking what getting off early had to do with the eleventh hour work request. (Tr. 29, 92–93.) There was a temporary interruption by another employee who had business with Sturgill. Sturgill became agitated when Madden asked about Rust's time off and told Rust to return to work. Sturgill shook his finger in Madden's face and Madden pushed it aside. Madden said at one point in the discussion according to Rust: "Now wait a minute Alvin. George, let's try to talk this out." (G.C. Exh. 3, p. 30.) Madden's version was "George, Alvin, wait a minute." (G.C. Exh. 3, pp. 40–41.) Respondent argues (R. Br. 5) that these versions are corroborative of Sturgill. (See also Tr. 46, 47, and 97.) Both Sturgill and Madden began to raise their voices, Madden saying that Alvin (Rust) had a right to bring a grievance and Sturgill stating that he, not Madden, was Rust's foreman. Sturgill then repeated twice, quickly, his instruction to Rust to return to work. Immediately after, Sturgill went into Vice President Dragon's office. While there, he reported the incident to Dragon but said he made no recommendation as to what action should be taken by Respondent. (Tr. 150–151.)[6] After Sturgill left, Rust returned to his machine (admitted by Sturgill, Tr. 143) but was subsequently seen by Sturgill passing Madden ("but it was just very quick") in the aisle where they exchanged a few words.[7] Dragon testified that, after talking with Sturgill, he spoke with an employee named Arrowsmith who was unable to report anything that was said between Sturgill, Rust, and Madden. (Tr. 185–186.) After speaking with Arrowsmith, Dragon consulted with another vice president named Fallon (who did not testify) and the two of them reviewed the shop rules. Those rules called for discharge in the event of insubordination. The two men then consulted with the Respondent's labor relations attorney and as Dragon testified:

> And after discussing it with Mr. Dooley, he sort of convinced me that maybe that [discharge penalty] was a little bit too severe, but there was something that should be done to—based on the fact that Alvin [Rust] had refused to go back to work—a direct order of the supervisor and that Glenn [Madden] had countermanded a—tried to countermand the order.

Later that same day, Rust and Madden were given written notices of disciplinary action which suspended each of them for a period of 3 days. (See R. Exhs. R-2, R-3, and R-4.)[8] The notices of suspension alleged that Rust had been insubordinate in not returning to work when ordered to do so by Sturgill and that Madden was insubordinate because "you told him [Rust] not to go back to work on two of the three orders by George Sturgill, who is Al Rust's foreman." On July 25, 1979 (the first day of his suspension), Madden filed the charge in the instant case with the Board's Cincinnati, Ohio Regional Office. The charge alleged violations of Section 8(a)(1), (3), and (5) of the Act. Subsequently, on August 30, the Regional Director administratively deferred the 8(a)(1) and (3) allegations regarding the suspension to arbitration under the Board's policy set forth in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). By letter dated August 31, the Regional Director dismissed that portion of the charge that alleged violation of Section 8(a)(5). An arbitration proceeding was held on May 27, 1980, before Arbitrator Theodore K. High. The arbitrator stated in his decision which issued on July 31, 1980 (G.C. Exh. 1(h), p. 9): "I am unable to find that Grievant Rust's failure to comply with the order to return to work should be excused." However, the arbitrator lowered Rust's penalty to a written warning. The suspension of Madden was upheld. In the section of his decision entitled "Award" (p. 10) the arbitrator stated:

> The grievances are denied to the extent that they allege that the Company did not have just cause for finding that the two Grievants were insubordinate and should have been disciplined. The discipline of Grievant Rust, however, is too severe for the degree of insubordination, under all of the circumstances. The Company will reduce the 3-day suspension to a written warning and restore all monies lost to Grievant Rust. The grievance as to Grievant Madden is denied.

On September 29, 1980, Claude T. Harrell Jr., a field examiner at Region 9 of the Board, wrote Respondent's counsel Daniel Dooley informing him that Charging

[5] Sturgill said he came by with the purpose of telling Rust to go back to work. The question is allegedly important because Sturgill, on the one hand, and Rust and Madden, on the other, disagreed as to whether the grievance problem was discussed for a short time prior to Rust's being ordered to go back to work. In my view of the case, Sturgill may have had such an intent, but I do not credit his account of the encounter, specifically his testimony that the first thing said was an order to Rust to return to work. I have taken into account the fact that Sturgill was discharged from Respondent's employ in November 1980 (*after* his testimony at the arbitration hearing).

[6] I do not credit Sturgill's testimony that he made no recommendation. He earlier testified that before going to the office he went to his work bench "to get some disciplinary slips" (Tr. 142) but was interrupted by a Mr. Arrowsmith concerning a matter not here relevant. Obviously, Sturgill had made up his mind to administer discipline prior to reporting to Dragon.

[7] Rust did not immediately return to his machine because the aisleway was blocked when the three participants were talking. All participants (Sturgill included, Tr. 142) agreed that the whole incident was "very quick," a fact which partially accounts for Rust's failure to return to work during the conversation.

[8] There are two copies of Madden's suspension in the record (R-2 and R-3) one of which (R-2) has the notation "employee refused to sign." While he, in fact, never signed the suspension notice, it is not clear that he refused to do so. Signing the notice merely operated as evidence of receipt. It did not constitute agreement by the employee that factual matter set out on the notice was true. Rust also did not sign. Both notices state that recurrence of the alleged conduct will result in discharge.

Party Madden "requested review of the arbitrator's decision. Such a review has been recently completed by the Regional Office pursuant to the standards set forth in *Spielberg Manufacturing Co.*, 112 NLRB 1080. After such review, the Regional Director has concluded that the arbitrator's decision with respect to the suspension of Mr. Rust and Mr. Madden is repugnant to the Act as it incorrectly interpreted the law."

B. *Analysis and Findings*

The first question for decision is whether the arbitrator's award is "clearly repugnant to the purposes and policies of the Act" under the doctrine of *Spielberg Mfg. Co.*, supra.[9]

The General Counsel makes no claim that the arbitration proceeding was not fair and regular on its face, nor does he claim that the parties had not agreed to be bound by its result. (G.C. Br. 6.) Thus two of the three criteria for deferral under *Spielberg* are met. The General Counsel does contend that "deferral to the arbitration award is not appropriate in this case because the arbitrator's factual findings are erroneous and because the arbitrator's legal conclusions are not consistent with Board law and are, therefore, repugnant to the Act." (G.C. Br. 6.) For the reasons set forth below, I agree that deferral is not appropriate. I find further that Respondent violated Section 8(a)(1) and (3) of the Act by suspending its employees Rust and Madden.

The unfair labor practice issue was presented to the arbitrator. In ruling on that issue, the arbitrator held that Rust and Madden were not engaged in protected activity. Citing *Terry Poultry Co.*, 109 NLRB 1097 (1954), and *Russell Packing Co.*, 133 NLRB 194 (1961), the arbitrator ruled that (1) there was no absolute right to discuss grievances during working time and (2) Respondent had no plant practice allowing discussion of grievances during worktime[10] I do not concur in the arbitrator's conclusion that *Terry Poultry* and *Russell Packing* are apposite to the facts of this case.[11] The arbitrator made no distinction between the initial Rust-Madden conversation concerning Rust's potential grievance about getting off early that day and the short conversation between Rust, Madden, and Sturgill.

Thus, the arbitrator stated in his award:

> As can be seen, there is a difference of opinion as to whether the foreman walked to the place where the two grievants were conversing for the purpose of ordering them back to work (as the foreman testified), or (as the two Grievants testified) whether he was passing and the Chief Steward asked if he had a minute. The implication of the latter version, of course, suggests that the foreman was acquiescing in a discussion of the grievance. Whether or not the circumstances justified that assumption on the part of the two Grievants, it soon became clear that any acquiescence had terminated abruptly, with the foreman ordering Rust—who worked under his direct supervision—to return to his work place and to go to his work . . . I am unable to find any basis for a right on the part of Grievants *Rust and Madden* to discuss the matter which was the subject of *their* conversation at the time it took place. While the subject matter may well have been an activity which is appropriately protected by law, it is also clear that, in the absence of a contractual right or acquiescence on the part of the Employer, there is no absolute right to discuss potential grievances while on Company time . . . . Accordingly, I find that the *Grievants had no absolute right to discuss the potential grievance at the time that they did.* (Emphasis added.)[12]

As can be seen from the first half of the above quotation, the arbitrator made no finding as to whether the Rust-Madden-Sturgill conversation began with an initial order by Sturgill to Rust to return to work or began by an acquiescence on Sturgill's part to discussion with Rust and Madden. The second half of the quotation clearly shows that the arbitrator's citation of *Russell Packing* and *Terry Poultry* applied only to the preliminary conversation between Rust and Madden prior to the arrival of Sturgill. Overall, I conclude from a reading of the entire award that the arbitrator made no distinction between the two conversations.

However correct the proposition that Rust and Madden were not engaged in *protected* union or concerted activity at the time of their initial conversation, their suspension did not arise from that conversation. The suspension arose from their conversation with Sturgill. The arbitrator, however, made no specific finding as to whether Rust and Madden were engaged in protected union or concerted activity as of the time they attempted to engage Sturgill in conversation about Rust's potential grievance. He appears to have treated both conversations as one with both being equally unprotected. While he mentions the issue of Sturgill's acquiescence in discussing the potential grievance, he makes no finding of fact on that issue, simply stating that *if* there were acquiescence it was summarily withdrawn by Sturgill's order to Rust

[9] The Region's September 29, 1980 letter R-1, quoted above, asserts only that the arbitrator's award is "repugnant," not "clearly repugnant." I do not find that the Region was using a standard other than the one enunciated in *Spielberg*. In any event, my own analysis is based on a "clearly repugnant" standard.

[10] "Work time" here means that time when employees are actually working as opposed to break or lunch time, etc. Cf. *T.R.W. Bearings*, 257 NLRB 442 (1981) (no-solicitation rule for "work time").

[11] *Terry Poultry* involved violations of a presumptively nondiscriminatory rule against leaving the production line in a chicken processing operation. *Russell Packing* involved participation in an illegal work stoppage. Neither Rust nor Madden was disciplined specifically for leaving the production area, although Respondent has a shop rule 2: "Leaving work without permission from foreman, superintendent or plant manager." See R. Exh. 5. No claim was made that either Madden, in the performance of his duties as union steward, or Rust was engaged in a "work stoppage" contrary to the provisions of art. IX of the collective-bargaining contract. See G.C. Exh. 2.

[12] It was at this point that the arbitrator cited *Russell Packing* and *Terry Poultry*, supra. The General Counsel incorrectly states in his brief that the arbitrator held that Rust and Madden had "no absolute right *to file a grievance* during working time." (Emphasis added.) The arbitrator's award refers to the *discussion* of grievances during worktime (between Madden and Rust) and nowhere does the arbitrator indicate in his award that Madden was trying to *file* a grievance with Sturgill.

to return to work. In sum, I conclude that deferral to the arbitrator's award in this case is inappropriate because the arbitrator has not specifically made factual rulings necessary to a determination of the precise questions involved: (1) Were Rust and Madden engaged in protected concerted or union activity when they attempted to engage Sturgill in conversation about Rust's potential grievance? (2) Assuming, arguendo, that the two employees were engaged in such protected activity, did their conduct toward Sturgill remove them from the protection of the Act? Whether the refusal to defer be rationalized on the basis of the repugnancy standard, which the General Counsel contends for in his brief (citing *Sea-Land Service*, 240 NLRB 1146 (1979); *Health Care Employees District 1199E (Greater Pennsylvania Ave. Nursing Center)*, 238 NLRB 9 (1978); *Illinois Bell Telephone Co.*, 221 NLRB 989 (1975), and *Owners Maintenance Corp.*, 232 NLRB 100 (1977)), or on the basis that the arbitrator has, in effect, failed to rule on the unfair labor practice issue, *Raytheon Co.*, 140 NLRB 883 (1963), enf. denied on other grounds 326 F.2d 471 (1st Cir. 1963), and *General Warehouse Corp.*, 247 NLRB 1073 (1980), enfd. 643 F.2d 965 (3d Cir. 1981), might appear to be a matter of analytical taste. The U.S. Court of Appeals for the Third Circuit has, however, commented in *NLRB v. General Warehouse Corp.*, supra at 969 fn. 12:

> Several courts have chosen to integrate this fourth requirement [consideration of the unfair labor practice issue] from *Raytheon* into their analysis of whether the third *Spielberg* requirement [not clearly repugnant to the Act] has been met. These courts hold that the arbitrator's failure to consider and rule on the statutory issue actually leads to a decision clearly repugnant to the Act and thus a failure to meet the third *Spielberg* requirement. . . . We decline to follow this mode of analysis both because we want to emphasize the importance of this separate requirement. . . . and because the history of the third *Spielberg* requirement suggests that it was intended to cover the more specific situation where the arbitrator's decision, on its face, conflicts with the Act.

Here, I find, contrary to the General Counsel, that an analysis couched in terms of the arbitrator's failure to "consider the statutory issue and rule on it or all the facts required to decide it . . ." (*NLRB v. General Warehouse Corp.*, supra at 969) most nearly accords with the current state of the law. Certain it is that if "the arbitrator's decision is ambiguous as to the resolution of the statutory issue . . . the 'clearly decided' requirement has not been met," *Stephenson v. NLRB*, 550 F.2d 535, 538 fn. 4 (9th Cir. 1977), and that the "record must yield clear indications that the arbitration panel specifically dealt with the issues *underlying the unfair labor charge* . . . ." See *Bloom v. NLRB*, 603 F.2d 1015, 1020 (D.C. Cir. 1979) (emphasis added). See also *Banyard v. NLRB*, 505 F.2d 342, 347 (D.C. Cir. 1974), where the court, in refusing to find deferral to an arbitral award appropriate, noted that there was no indication "that the [arbitration panel's] judgment was exercised at all on the crucial issues regarding violation of the Ohio statute." The arbitrator has failed to make underlying findings crucial to a decision of the unfair labor charge, viz, the protected status (or lack of it) of the Rust-Madden-Sturgill conversation, and whether Sturgill initially acquiesced in a discussion of Rust's potential grievance. I therefore do not find deferral appropriate.[13]

C. *The Suspension of Rust and Madden*

Respondent contended at the hearing that the Board was bound by the factual findings of the arbitrator even where the Board found it inappropriate to defer to the arbitral award. I reserved judgment on that question and permitted the General Counsel to develop a full record on the Rust-Madden suspension. I here find, under the circumstances, that the General Counsel and the Board are not bound in this case by the arbitrator's factual findings. *Pincus Bros., Inc.*, 237 NLRB 1063 (1978). The Board there commented that "in the circumstances herein the good sound administration of the Act is better served if the allegations of the complaint are established in the normal manner, before the Board makes its findings of facts and conclusions of law concerning such allegations or issues any Order based thereon."[14] See also *Douglas Aircraft Co.*, 234 NLRB 578 (1978), and *Dreis & Krump Mfg., Inc.*, 221 NLRB 309 (1975), both cited by the Board in *Pincus Bros.* The Board in *Pincus Bros.* specifically declined to "decide here, when, if ever, it would be proper to defer to an arbitrator's factual findings while at the same time finding his award repugnant to the policies of the Act." The Board has thus, at the least, reserved freedom of action for itself. I follow *Pincus Bros.* because deferral to the arbitrator's factual findings is peculiarly inappropriate in a case where the award itself is not binding because of the arbitrator's failure to make findings on vital factual issues underlying the charge of unfair labor practices.

Turning to the facts of the instant case, I find that Rust and Madden were engaged in protected concerted and union activity, viz, presentation of a grievance matter, when they broached the question of Rust's afternoon time off to Sturgill. *Trailmobile Division*, 168 NLRB 230 (1967). I do not find any "unusual circumstances" present within the meaning of the *Trailmobile* decision because Sturgill initially agreed to a discussion and because, as Sturgill himself freely admitted, he had, in the past, discussed grievances on paid worktime with stewards and committeemen. (See Tr. 148.) Additionally, Sturgill admitted that it was a "regular occurrence" for

[13] I must emphasize that what is involved is *not* a question of substituting the Board's factual judgment for that of the arbitrator. To do that would involve "defeating the purposes of the Act and the common goal of national labor policy of encouraging the final adjustment of disputes, 'as part and parcel of the collective bargaining process.'" *International Harvester Co.*, 138 NLRB 923, 929 (1962), quoting *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578 (1960). The arbitrator has, in my judgment, simply failed to make necessary findings for a resolution of the case in accord with Board law.

[14] This would not preclude the parties in an appropriate case from stipulating that they be so bound. See *Sea-Land Service*, supra, 240 NLRB 1146, where such a stipulation was entered into by the parties and the Board decided the case on the basis of the stipulation.

him to discuss grievances with both the grievant and the steward present *on worktime*. (Tr. 154.) Under these circumstances I find unconvincing Respondent's position that Rust and Madden were not engaged in protected activity while engaged in conversation with Sturgill on this occasion.[15] As above mentioned, I find that Sturgill initially agreed to converse with Madden and Rust (Tr. 28). On hearing Madden's outline of the problem, Sturgill became angry and agitated (Tr. 29) and made the first of a series of orders to Rust to return to work. I find that Sturgill became agitated because his earlier remarks to Rust about "favors" had been brought up by Madden in connection with the statement that time off because of a vehicle malfunction was a matter of company policy. At this point, Sturgill might have refused to discuss the matter until a later time without involving Respondent in an unfair labor practice. Instead, he excitedly ordered Rust back to work several times and became involved in a heated discussion with Madden over the latter's right to discuss the grievance. Both Madden's testimony before me as well as that before the arbitrator (G.C. Exh. 3) make it clear, and I so find, that Madden was not attempting to countermand Sturgill's order to Rust. He was, as he testified, attempting to calm things down and his expostulation "wait a minute" was synonymous with a request to Sturgill not to act in a hasty fashion. In short, it amounted to a request to Sturgill to continue the discussion so that the matter could be settled without further action. While Rust did not immediately move to return to work on the first request, he credibly testified that Sturgill was then blocking the aisleway leading back to the work area. Rust and Madden testified that when Rust returned to his work area immediately he was able to move through the aisleway. Sturgill admitted that immediately after he picked up the disciplinary slips (prior to his going into the office to see Dragon) he saw Rust at his machine. (Tr. 158.) I find that Rust had no intent to disobey Sturgill's order and, in fact, returned to his machine as soon as he was able. I thus find that, while Rust and Madden were engaged in the protected activity of attempting to discuss a grievance with the foreman, they did not engage in misconduct sufficient to remove them from the protections of the Act. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Penalizing employees "for union-related conduct protected by Section 7 of the Act such as that considered here is inherently destructive of important employee rights and thus requires no proof of antiunion motivation." *Pittsburgh Press Co.*, 234 NLRB 408 (1978). I therefore find that by suspending its employees Rust and Madden for 3 days on July 24, 1979, Respondent violated Section 8(a)(1) and (3) of the Act.

[15] Respondent presented R. Exh. 7, being the 1975 proposals of the Union in contract talks. At art. VIII of R. Exh. 7, the Union proposed to add a provision calling for processing of grievances by the union committee on paid worktime. This provision was not present in the final contract. No evidence was presented concerning the actual negotiations other than certain conclusionary remarks by Respondent President Freeman at Tr. 215. He, however, testified at Tr. 217 that Respondent was "lenient" in this area and at Tr. 216 that an employee could take up a grievance immediately with his supervisor. Additionally, it is not clear that the informal type of presentation in which Rust and Madden participated in on July 24 with Sturgill was the same type of procedure called for in art. VIII of R. Exh. 7.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Association of Machinists and Aerospace Workers, Local Lodge 162, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By suspending its employees Alvin Rust and Glenn Madden for 3 days on July 24, 1979, Respondent has violated Section 8(a)(1) and (3) of the Act.

REMEDY

I shall direct that Respondent make whole its employees Alvin Rust and Glenn Madden for any loss of pay they may have suffered as a result of their 3-day suspension. Backpay shall be computed with interest in the manner set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977), and cases cited therein.[16] I shall further direct that all documents relating to the July 24 suspension be removed from the personnel records of Rust and Madden. As I do not find that Respondent's violation in this case demonstrates that it has a proclivity to violate the Act, I will not issue a broad cease-and-desist order. *Pyromatics, Inc.*, 251 NLRB 1017 (1980).

[Recommended Order omitted from publication.]

[16] The arbitrator ordered that Rust be compensated for the 3-day suspension but did not direct the payment of interest.